IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 620 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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DR. NARENDRA RAMJIBHAI THANKI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR ADIL MEHTA for Appellant(s) : 1, MR KJ SHETHNA for Appellant(s):1,
MR AJ DESAI, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 28/06/2007

CAV JUDGMENT

1. The appellant-orig.convict (hereinafter referred to as 'the appellant') has preferred present appeal under Section 374 of the Code of Criminal Procedure, 1973, assailing the legality and validity of the judgment and

order of conviction and sentence dated 20th July 1990 passed by the learned Sessions Judge, Rajkot in Special Criminal Case No.45/86. The appellant has been found guilty of the charge of the offence punishable under Section 161 of the Indian Penal Code and also under Section 5(2) of the Prevention of Corruption Act (hereinafter referred to as 'the Act') and he has been asked to undergo one year imprisonment and a fine of Rs.1000/- for the offence punishable under Section 5(2) of the Act and in default to undergo further three months' imprisonment. So far as the offence punishable under Section 161 of the Indian Penal Code is concerned, the appellant is asked to undergo imprisonment for a period of six months and a fine of Rs.500/- and in default to undergo further three months' punishment.

2. The judgment and order of conviction and sentence is assailed on various grounds as mentioned in paragraph no.6 of the memo of the appeal and Shri K.J. Shethna, learned counsel appearing for the appellant, has taken this

Court through the prosecution case and all these grounds along with the oral as well as documentary evidence led during the course of trial. He has also taken me through the relevant part of the judgment and order of conviction and sentence under challenge and has argued that the judgment and order of conviction and sentence is not sustainable in the eye of law. It is submitted that certain grave errors have been committed by the learned trial Judge while appreciating the evidence vis-a-vis the probabilities of false implications shown by the appellant by pointing out speaking circumstances. The absence of transparency in the investigation as well as the entire exercise of carrying out trap to implicate the appellant, is also one of the main arguments.

3. On the other hand, Shri A.J. Desai, learned Additional Public Prosecutor, appearing for the respondent-State, has strongly supported the judgment and order of conviction and sentence, and has argued that the reasons assigned by the learned trial Judge while

linking the appellant with the offence in question are sound in nature. The learned trial Judge has appreciated the evidence keeping in mind the basic principle and there is no illegality or perversity in the finding recorded by the learned trial Judge. The hammering by Shri A.J. Desai is on the point of conduct of the appellant and on the fact that he was not otherwise entitled to touch the currency notes. The learned trial Judge has rightly raised the presumption against the appellant and it is submitted that the finding of the learned trial Judge is absolutely logical for not accepting the theory of false implication. Detailed submissions have been made by both the sides, which shall have to be considered while evaluating the judgment and order of conviction and sentence under challenge.

4. It would be appropriate at this stage to state the case of the prosecution in brief. The complainant-Bavanji Bhurabhai Ahir, resident of village Vadodar of Taluka Dhoraji, District Rajkot, was feeling pain in his abdomen and,

therefore, he had gone to the Government Hospital at Dhoraji on 07th January 1986. The appellant was the Medical Officer and Gynaecologist in the said hospital and, therefore, the complainant approached the appellant for treatment. The appellant examined the complainant and told that he is suffering from Appendicitis and he should undergo a surgery. The complainant asked the appellant as to on which day the surgery can be performed so that he can come for the said purpose. In turn, the appellant told him that the surgery shall be performed on 09th January 1986 and the complainant should bring the amount of Rs.200/- for expenses. The appellant told the complainant that if he (the complainant) will give an amount of Rs.200/-, he (the appellant) will perform surgery and will take proper care. The complainant then was asked to come on 09th January 1986 between 10-00 a.m. and 12-00 p.m. with the said amount of Rs.200/-. It is further the case of the prosecution that the complainant then approached the Anti-Corruption Bureau (hereinafter referred to as 'the ACB') Police

Inspector Shri D.N. Manjariya in the ACB Police Station at Rajkot on 08th January 1986 at about 08-30 p.m. He narrated the details and the then Police Inspector Shri D.N. Manjariya recorded the details in the form of a complaint i.e. FIR which is at Ex.13 in the present case. One Babulal Laljibhai Patel and one another person namely Kishorbhai Bhanubhai Patel, both resident of Rajkot were called and requested to act as panchas. Both the panchas were informed to come down to the office of the ACB on 09th January 1986 in the early morning. These instructions were given on 08th January 1986 and thereafter, the first part of panchnama was drawn at Rajkot between 06-30 a.m. and 08-30 a.m. on 08th January 1986. It is the say of prosecution that thereafter the raiding party proceeded towards Dhoraji and as per the details mentioned in the first part of panchnama, the complainant and panch no.1 went inside the hospital. The complainant was addressed with name and was asked about the amount by the appellant. On demand made by the appellant, the complainant handed over the muddamal currency notes i.e. bribe amount of

Rs.200/- to the appellant. The appellant had accepted the said amount. Thereafter, as per the instructions, the signal was given by the complainant and raid was carried out by Police Inspector Shri Manjariya. In Dhoraji Hospital itself, the second part of panchnama was drawn and it was completed at about 01-30 p.m. After investigation and obtaining sanction from the competent authority, the appellant was chargesheeted. The gist of the case of the prosecution is reflected in the charge framed by the learned trial Judge at Ex.8. After evaluating the evidence of PW-1- complainant Ex.12, PW-2 Dresser-Chanabhai Ugabhai Ex.8, PW-3 Panch Witness- Babulal Laljibhai Patel Ex.25 and PW-4 ACB Police Inspector Shri Manjariya Ex.31, the learned trial Judge has recorded the finding that the prosecution has successfully established the charge beyond reasonable doubt.

5. After examination of PW-4 Police Inspector Shri Manjariya, a point as to the legality and validity of sanction accorded by the competent authority had cropped up and, therefore, on

account of one order Ex.43, after hearing the argument on merits, the Court examined one more witness i.e. PW-5, who proved the order of sanction Ex.45. Here is a case where ACB Police Inspector Shri Manjariya had selected two panchas from public (private individuals) who were not Government servants.

6. According to Shri Shethna, learned counsel appearing for the appellant, the learned trial Judge ought not to have believed the complainant as genuine witness and victim of a corrupt administration of the hospital. On the contrary, the conduct of the complainant makes him a doubtful patient of abdominal pain who had agreed to undergo surgery even without perfect diagnose. The goal of the complainant was to implicate the appellant by arranging a trap for extraneous reasons and the learned trial Judge ought to have appreciated the detailed evidence in the background of the defence placed by the appellant. The cold war between Dr.Raithaththa who was Incharge of the hospital as head and the appellant who was posted vice the said Dr.Raithaththa, has not

been correctly looked into by the learned trial Judge, is the second grievance. The documentary evidence was produced which satisfactorily indicates that the appellant had forcibly taken the charge vice the said Dr.Raithaththa and in couple of weeks the appellant has been implicated in this trap with the help of the complainant. While reading the evidence (page no.61 of the paperbook), Shri Shethna has submitted that one Maganbhai Dahyabhai is the brother-in-law of Dr.Raithaththa. He is the resident of one of the villages of Dhoraji Taluka and one Shri Rupareliya who is the caste-fellow of Dr.Raithaththa was Sarpanch of village Pinpali of the same Taluka. So these local people have helped including the complainant in arranging a false trap with the help of Police Inspector Shri Manjariya. But according to Shri Shethna, the falsity in the case of the prosecution is found exposed during the course of examination of this witness and mainly the complainant and Police Inspector Shri Manjariya. Non-examination of important independent witness who was present in the vicinity including a

lady peon who was just sitting outside the cabin-cum-examination room of the appellant and who has not been examined. The presence of panch no.1 in the cabin of the appellant appears to be doubtful. When the selection of panch is found fishy and transparency has not been maintained by Police Inspector Shri Manjariya in selecting the panchas, the evidence of panch no.1 ought not to have been believed as gospel truth, is also one of the arguments of Shri Shethna. Shri Shethna has further argued that the learned trial Judge has ignored the discrepancy in the evidence of the complainant as well as panch no.1 as to the demand made prior to the acceptance and the alleged version that had taken place at that very point of time. One question is also posed by Shri Shethna that if the complainant was knowing that as the hospital is a Government Hospital, he is not to pay for any treatment and the treatment is free of costs, why he asked the doctor/appellant for any expenses. It is clear that the complainant was well-informed and an experienced person, and was undergoing treatment for the alleged

abdominal pain since long, is the say of the complainant; which indicates that he would not have agreed for surgery with the gap of one day in between on clinical examination done by the appellant. According to the complainant, when he reached the office of the appellant at Rajkot, it was about 21-00 hrs. and at that time his complaint was registered. The learned trial Judge has not even applied mind on the point as to how the ACB Police Inspector Shri Manjariya was present in his office personally at that time. It is not the say of the prosecution that on arrival of the complainant in his office, Shri Manjariya immediately came down to the ACB Office and recorded the complaint. The entire story is created by the prosecution about the demand of bribe amount of Rs.200/- made by the appellant, and thereafter, the decision of the complainant to go to Rajkot with a view to file a complaint with the ACB Police Station on 08th January 1986 and, therefore, he reached at Rajkot at 21-00 hrs. taking an amount of Rs.250/- with him and after reaching the office of the ACB, he gave the complaint i.e.

FIR in question, which according to Shri Shethna, is an unbelievable story. The learned counsel who cross-examined the complainant has taken out various facts which suggest that the complainant is suppressing the inner story. On the contrary, the evidence speaks that Shri Manjariya was aware about the arrival of the complainant and, therefore, even before recording the complaint, the private personnel were contacted and they were asked to accompany Police Inspector Shri Manjariya as members of the raiding party. It emerges from record that wth the help of Dr.Raithaththa and his family members, the complainant had reached Rajkot as he had agreed to help Dr.Raithaththa at the instance of Sarpanch of village Pinpali. According to Shri Shethna, learned counsel appearing for the appellant, PW-2 Chanabhai Ugabhai-Dresser in the said Hospital, has produced the case papers. This witness has stated that on 07th January 1986, when the complainant had visited the hospital with the complaint of abdominal pain, there were about 95 visitors because 95 new case papers of new patients were prepared on that

day and on 09th January 1986 about 66 new cases were registered in the said Government Hospital. Of course, there is no evidence as to how many of these patients were examined by the appellant on 07th and 09th January 1986. Before the complainant entered on 09th January 1986 i.e. on the day of the trap in the cabin of the appellant, who was the last patient and on that day how many surgeries were to be performed ? By drawing the attention of this Court to paragraph no.6 page no.78 of the paper-book, a crucial question has been posed before this Court as to whether the complainant was really a patient or had simply visited the Hospital to create a background for the appellant because it is in evidence that certain articles are required to be produced and brought into Hospital at the expenses of the patients and as the hospital has no Anaesthetist, the patients were required to arrange for Anaesthetist by paying fees to the Anaesthetist and other outside agencies, if the service of such outside agencies is taken. It is in evidence that the said Government Hospital had some laboratory

facilities. Another backbone of argument of Shri Shethna is that in the present case, the panchas have been selected by Shri Manjariya as he was aware about the falsity hidden in the trap exercise. Surprisingly the panch no.1 was knowing Shri Manjariya. Shri Shethna has drawn the attention of the Court to his evidence which is at Ex.85 of the paper-book, from where it emerges that there was presence of Shri Manjariya at the spot when the panch no.1 was stopped, called and selected as well as on the date of deposition of panch no.1 in the Court premises. The evidence at page no.86 should be read along with the evidence which is at page no.41 of the paper-book because it is on record that the complainant had reached Rajkot at 08-30 p.m. in the office of the ACB and the panchas were selected in couple of minutes from the place which is at a reasonable good distance. It is not the case of the prosecution that panchas were called in the office immediately and with the help of staff members, presence of panchas was procured on 08th January 1986. Neither Shri Manjariya nor the panch no.1 has explained as

to how panch no.1 was knowing Shri Manjariya sa such when there is no evidence even by panch no.1 suggestive of an unqualified demand of bribe, the learned trial Judge ought not to have drawn any inference in favour of prosecution nor any presumption could have been drawn against the appellant. There is no corroborative piece of evidence to the version of the complainant qua the initial demand of bribe amount of Rs.200/- made by the appellant on 07th January 1986. After reading the evidence at paragraph no.12 page no.92 of the paper-book, it is argued that the panch has emerged as a person interested and therefore, his evidence ought not to have been considered as an evidence of an independent third person. How there could be any presence of panch witnesses with the complainant before ACB Police Inspector Shri Manjariya prior to formal recording of complaint, is a crucial question and this question has not been properly answered by the prosecution and, therefore, the evidence of panch should not be given any weightage.

7. It is argued that the approach of the learned trial Judge was absurd while dealing with the evidence as to the presence of anthracene powder marks. It appears that the presence of anthracene powder has been considered as clear proof of acceptance of bribe amount ignoring number of infirmities and other relevant aspects. The complainant was not the first patient on the day of trap in the hospital. On the contrary, it is in evidence that number of other patients were there and on getting permission from the lady peon, the complainant had entered the cabin of the appellant and at the time of drawing second part of panchnama, an amount of Rs.160/- only was found from the appellant (page no.121 of the paper-book). If the doctor/appellant was habitual bribe taker, then some more amount could have been realised during the course of trap from the appellant. The absence of recovery of cash amount from the drawer of the appellant is a circumstance relevant if the actual recovery only of Rs.160/- is considered. The entry of contradictions brought on record and proof makes the evidence of the complainant as well

as panch no.1 more infirm. There is nothing in evidence to show that panch no.2 was present in the hospital itself when panch no.1 had entered into the cabin of the appellant. In the same way, it is also not clear from the evidence that when the panch no.1 was called initially to assist the ACB party in arranging the trap, whether the panch no.2 was present there or he was called subsequently. Shri Shethna has drawn attention of the Court to the age of the panch witnesses and has argued that it is possible that both these panch witnesses may be knowing each other much prior to 08th January, 1986 i.e. the day on which they were called by Police Inspector Shri Manjariya.

8. It is further argued by Shri Shethna, learned counsel appearing for the appellant, that as per the accepted principles of our criminal jurisprudence, the accused is entitled to take and develop the alternative defences and some pleas may be in conflict with the other one and therefore, the appellant in the present case has placed two types of defence theories

and the learned trial Judge has failed in appreciating both individually or alternatively. According to the appellant, the amount was planted forcibly because the complainant as well as the panch no.1 was interested in success of the trap and panch no.1 being a partisan witness and interested in the result, has supported the case of the prosecution and, therefore, no weightage should be given to the presence of anthracene powder marks on the hands of the appellant and at other places or to the evidence of recovery of muddamal currency notes from the appellant. The other probability is that as the complainant was to be operated, he was supposed to pay to the Anaesthetist and other people independently if called from the other outside agencies, and therefore, he might have induced to accept the amount of Rs.200/-. So after surgery, the payment can be made immediately to the Anaesthetist, etc. There is no evidence as to the system which was adopted in Dhoraji Government Hospital for making payment to the visiting Anaesthetist or Pathologist in the event of blood transfusion.

As such in the present case no parallel test was carried out, no X-ray was taken and before surgery certain formalities were required to be performed; it is difficult to accept the allegation as proved that the complainant was to be operated on 09th January 1986 and he was called for surgery on that day.

9. According to Shri Shethna, learned counsel appearing for the appellant, the appellant has been prosecuted without legal and valid sanction for prosecution. Of course, PW-5 Madhusudan Purshottam Parekh, has been examined vide Ex.45, but this witness has failed in establishing the validity of the order of sanction. This witness was serving as a Secretary, Health and Family Planning Department of the State of Gujarat and he had recommended to the Chief Secretary to accord sanction. Ultimately, the Health Minister takes decision and how either Health Minister or Chief Secretary took decision to accord sanction, has not come on record. On the contrary, when it has come on record that the draft sanction was sent by the ACB itself, the

learned trial Judge ought to have held that the sanction is accorded mechanically. At least the learned trial Judge ought to have considered the earlier order passed which is at Ex.43. So in the present case, this Court should observe that the appellant is required to be acquitted as he has been prosecuted without legal and valid sanction. For short, according to Shri Shethna, the judgment and order of conviction and sentence is required to be set aside and the appellant is required to be acquitted from the charges levelled against him in respect of the offence in question.

10. Shri A.J. Desai, learned Additional Public Prosecutor, appearing for the respondent-State, while supporting the judgment and order of conviction and sentence under challenge has replied all the points placed by Shri Shethna on behalf of the appellant. According to Shri Desai, the litigation between Dr.Raithaththa and the appellant would not help the appellant because there is nothing on record to show that one Shri Rupareliya was the Sarpanch of

village Pinpali. Even the appellant had not led any evidence to establish any relation between Dr.Raithaththa and the said Shri Rupareliya who was alleged to be the Sarpanch of village Pinpali. There is no evidence as to the geographical distance between village Pinpali and village Vadodar of the complainant, though they are of the same taluka and when there is no evidence as to the relation of appellant with Shri Rupareliya-so called Sarpanch of village Pinpali, the appellant may not be permitted to take disadvantage of an independent litigation which had taken place between him and Dr.Raithaththa. There is no suggestion made to the complainant that he was treated earlier by Dr.Raithaththa and, therefore, he was in contact with Dr.Raithaththa and he, therefore, had decided to act as a tool of Dr.Raithaththa. The defence side has also not answered as to how the implication of the appellant would help Dr.Raithaththa to get him reposted at Dhoraji Hospital. So no weightage is required to be given to the documentary evidence produced in relation to the

litigation between the appellant and Dr.Raithaththa and/or Government. This document merely suggests that Dr.Raithaththa was transferred and he was reluctant in taking over the charge and ultimately, the appellant had taken over the charge with the help of pressure put on by the Health Department and the complainant had no animosity with the appellant. On the contrary, the complainant was interested in getting advice from the appellant and the appellant was approached for proper diagnosis. It is true that after the trap the appellant has neither taken treatment of Appendicitis nor he has gone for any surgery for Appendicitis or any treatment for abdominal pain. But this by itself should not be viewed with any doubt and it would not be proper for this Court to observe that he was not a patient of abdominal pain at all and he had pretended to be a patient of abdominal pain for the last six months prior to the date of his visit to Dhoraji on 07th January 1986.

11. The next point placed by Shri A.J. Desai, learned Additional Public Prosecutor, is that

the conflicts in the evidence of the complainant and the panch; and so also the contradictions proved, if are read in reference to other evidence, then they would look minor. Why the panch witnesses, both resident of Rajkot, would try to act as a tool in a false trap arranged by a villager of Taluka Dhoraji, Dist.Rajkot. No material improvements have been made either by the complainant or the panch witnesses. It is true that the panch witness has attempted to suppress his profession and the complainant is also an agriculturist but this by itself would not make both these witnesses doubtful. On the contrary, the complainant get sufficient corroboration from the panch no.1 examined in the present case. It is true that the method of selection of panchas by Police Inspector Shri Manjariya is unusual and it was possible for him to call independent Government servants as the trap was to be carried out on the next day morning. But this by itself would not make the procedure adopted in selecting the panch either fishy or non-transparent. In the present case, the plea that the trap was

the plan of Dr.Raithaththa, has not been found to be a good defence by the learned trial Judge and when no relation between the complainant and Dr.Raithaththa is found to be established, the arguments advanced on this count should be ignored. Shri Desai has taken this Court through the relevant part of panchnama at page no.102 of the paper-book and the reasons assigned by the learned trial Judge evaluating the evidence of panch witness and the panchnama (page nos.186-187). The case papers produced in the present case clearly suggest that the complainant strongly corroborates the complaint and it is the case of the prosecution from the very beginning that on 07th January 1986, the complainant was asked to come on 09th January 1986 with an amount of Rs.200/-. The date of operation was not fixed on 09th January 1986. It is the say of the prosecution that it was not the day of admission of the patients and the day of admission was decided by the appellant and there is unqualified demand by the appellant that the complainant shall have to pay an amount of Rs.200/- before the surgery. The

case papers tendered in evidence by the prosecution have been received in evidence on admission made by the defence counsel. So the Court should consider both case papers and the learned trial Judge has rightly considered this part of evidence. In the same way, the argument of Shri Shethna should not be accepted that the complainant was not a patient of abdominal pain at all and he may have worked as a tool in arranging the false trap because the appellant himself has diagnosed the complainant as a patient of Appendicitis. Of course, it may be a clinical finding, but at least the appellant should not be permitted to argue that the complainant was not at all a patient of abdominal pain and he was a tool. There is no evidence on record to show that the complainant had visited the hospital earlier i.e. prior to 07th January 1987 and was also a patient of Dr.Raithaththa. It was not possible for Dr.Raithaththa to select panchas. It would be illegal to argue that Dr.Raithaththa may have played some role in arranging the trap. The defence ought to have brought some concrete material to

establish the link between the complainant and Dr.Raithaththa and also between panch witness and Dr.Raithaththa. Mere suggestion cannot take place of proof and no concrete suggestion is made to the complainant about his relation with Dr.Raithaththa.

12. Shri Desai has furhter argued that it is true that the complainant was prosecuted earlier for two different offences but that by itself would not make the complainant doubtful. Those two cases were petty criminal cases and registration of such two criminal offences would not make the complainant court-bird or a person conversant with the procedure of the Court. One Naranbhai, of course, was a member of the Executive Committee of the Trust and the said Naranbhai, at the relevant point of time, was serving under Police Inspector Shri Manjariya, when the present panch was selected. Meaning thereby, he was one of the staff members of the ACB Police Station, so also a member of the Executive Committee where the panch no.1 was there as a member. But absence of any link of Police Inspector Shri

Manjariya and the said Nathabhai with the complainant, would not make the case of the prosecution doubtful, is the say of Shri A.J. Desai, learned Additional Public Prosecutor. The Court should not view the selection of panch as bad or biased procedure because there is nothing on record to show that Shri Manjariya was aware that the person selected by him as first panch had any link or relation with the said Nathalal Chandarana or his staff member Naranbhai. According to Shri Manjariya, he had seen the complainant for the first time at about 08-30 p.m. on 08th January 1986 and he himself had come out of his office and had selected panchas from the persons who were passer-by on the road which is just adjacent to the State Bank of Maharashtra building and the panchas were selected at about 10-00 p.m. and both of them were asked to come to the office of the ACB at 06-00 a.m. on the next day i.e. 09th January 1986. Initially the panch no.2 was selected and after 5 minutes, the panch no.1 was selected. But Police Inspector Shri Manjariya has denied the suggestion that both the panchas were taken together at the

office of the ACB. The denial of suggestions by Shri Manjariya in paragraph no.18 of his deposition makes one thing clear that Police Inspector Shri Manjariya is not aware that the office bearers of the said Trust were being called to act as panchas in the ACB trap cases either by him or one another Police Inspector Shri Sarvaiya. He has even denied that Nathabhai Kyada selected as panch in a trap against one Traffic Constable Majbootsinh Jadeja, was the President of the said Trust at that time and he was selected because he was the office bearer of the said Trust. Shri Manjariya has stated that he is not aware about this fact.

13. It is true that the panch selected by Police Inspector Shri Manjariya was an active member of one institution registered as Public Charitable Trust and relevant document has been brought on record by the defence side during the course of cross-examination of panch witness vide Ex.27. The panch was a member of Executive Committee of that institution registered in the name and style

of “Sardar Patel Yuvak Mandal”. One Nathalal Bhagwanji Kyada was the Vice President and another person having similar name i.e. Nathalal Chandarana was the Secretary of the said Trust. Even on the date of deposition, this Nathalal Chandarana was the Secretary of the said Trust. According to Shri A.J. Desai, learned Additional Public Prosecutor, merely because this Nathalal Chandarana, Secretary of the Trust, was called and selected as panch by ACB Police Inspector Shri Manjariya in a trap arranged against one Abdul Karim Babubhai Mogal, would not make the panch in the present case a person interested in the outcome of the case and selection of Nathabhai Chandarana as panch by ACB Police Inspector should not be viewed with any doubt. The defence side has tried to establish a link between ACB Police Inspector Shri Manjariya and the Trust and its office bearers. But this Court should not accept the arguments advanced on this point. According to Shri A.J. Desai, learned Additional Public Prosecutor, the defence was under obligation to establish relation between panch Babulal and the complainant to the

satisfaction of the Court. The defence could not show probabilities for this purpose.

14. It is submitted by Shri A.J. Desai, learned Additional Public Prosecutor, that the anthracene powder marks were on the fingers of the appellant and the Court should look to the conduct of the appellant. The case papers clearly reveal that the complainant was to be admitted on 09th January 1986 for surgery and was to be operated on the next day. When the documents show that the appellant had adopted a particular method to indulge into corrupt practice then there was no need to examine Shantaben, a lady peon, who was sitting outside the cabin, or any other patient who was there near the cabin of the appellant. The recovery of amount from the appellant is proved satisfactorily by the prosecution and, therefore, the learned trial Judge is right in drawing presumption against the appellant. Ultimately, the complainant was a rustic villager coming from lower middle class and he had no reason to implicate the appellant, that too a doctor who was to operate him. Merely

because the complainant had a meager amount of Rs.25/- in his pocket at the time of drawing first part of panchnama or he had started from his village with Rs.250/-, are not the circumstances to show that somebody must have financed him so that the trap can be laid down.

15. According to Shri A.J. Desai, learned Additional Public Prosecutor, the ratio of the decision in the case of ***Suvarna Singh v. State of Punjab,*** would not help the appellant because the facts of the cited decision are materially different. The Apex Court was dealing with the evidence of the approver in the background of the other facts and circumstances which were found established and in the same way, the observations made by the Apex Court in the case of ***Tara Chand Damu Sutar v. State of Maharashtra***, ***reported in AIR 1962 SC 130***, relied on by Shri Shethna also would not help the appellant. In paragraph no.21 of the cited decision, the Apex Court has observed (majority view) that *“A dying*

declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed if there are no grounds for doubting it at all." So according to Shri A.J. Desai, learned Additional Public Prosecutor, there is no substance in the appeal and therefore, the same is required to be dismissed.

16. The PW-1 complainant in his deposition as well as in the complaint has posed himself as a patient of abdominal pain and it was clinically diagnosed as pain due to appendicitis. He has stated that earlier he was taking treatment from other doctors prior to six months from the date of his visit to Dhoraji hospital. In his cross-examination, he has stated that during this period of six months, he had taken treatment from one Dr.Babubhai, Dr.Devjibhai and Dr.Jadavbhai; three different doctors; and he was treated on 15 to 20 occasions and these doctors were prescribing tablets but he had never consulted any doctor from Dhoraji. It is the say of the complainant that none of the doctors had

diagnosed that he is a patient of appendicitis. He was coming to Dhoraji on occasions but had not consulted any private doctor for the said abdominal pain. Therefore, when he felt pain again on 07th January 1986, he went to Government Hospital at Dhoraji and after clinical examination, he was straight way told that the pain is because of appendicitis and he shall have to undergo a surgery. The complainant has deposed that the appellant had told him against the query that he shall have to get himself admitted in the hospital on 09th January 1986 any time between 10-00 a.m. and 12 noon and the expenses would be Rs.200/-. The complainant, therefore, had told the doctor that he is a labourer. In response to this, the appellant had told him that an amount of Rs.200/- would be his expenses and if that amount is paid, only then he would take care during surgery and treatment. The complainant was also asked by the appellant to come down on 09th January 1986 between 10-00 a.m. and 12 noon and he was asked to bring an amount of Rs.200/-. He has further stated that in the evening he thought

that when he is to be operated in the Government Hospital, how and why he is asked to pay an amount of Rs.200/- and thereafter, he straight way proceeded to Rajkot on 08th January 1986 by bus, which was coming from Vanthli and proceeding towards Dhoraji and started for Rajkot from Dhoraji at about 04-30 p.m. The complainant reached Rajkot at 08-30 p.m. and inquired from an auto-rickshaw driver about the location of the office of the ACB. The said auto-rickshaw driver indicated the place and asked him that he can take the complainant to that office on his making payment of Rs.2/-. In the said auto-rickshaw, the complainant reached to the office of the ACB. At that time, Police Inspector Shri Manjariya along with three to four other persons was sitting in the said office. It is the say of the complainant that thereafter he narrated the details of the event occurred and the fact of demand of bribe amount of Rs.200/- made by the appellant and thereafter, Police Inspector Shri Manjariya asked him to sit in the office and recorded his complaint. The complaint was read over to him and the

complainant also put his signature on the said complaint. This complaint is at Ex.13. The learned trial Judge has considered the contents of the complaint while evaluating the evidence of the complainant. Thereafter, Police Inspector Shri Manjariya had asked him to stay over in his office or to stay in the Government Guest House, but at least the complainant shall have to go to the office of the ACB at about 06-30 a.m. on the next day. The complainant thereafter had stayed over in a private Guest House and reached to the office of the ACB at 06-30 a.m. At that time, two persons were present as panchas. Over and above these two persons i.e. panchas, Police Inspector Shri Manjariya, one Shri Chavda other members of the staff were also present and after brief introduction, the first part of panchnama was prepared. In that morning, Police Inspector Shri Manjariya had asked the complainant whether he had brought the amount which is required to be given as bribe amount with him and the complainant had replied in affirmative and two currency notes of denomination of Rs.100/- were tendered. These

very currency notes were smeared with anthracene powder with cotton swab and the said currency notes were used as muddamal currency notes. Necessary instructions were given and the complainant as well as panch no.1 were asked to behave in a particular manner and in case if the appellant asks about the identity of the accompanying complainant, it was decided that the panch no.1 should be introduced as the brother of the complainant. Thereafter, at about 08-50 a.m. everybody had proceeded towards Dhoraji in the Government Jeep Car. After reaching to Dhoraji Hospital, the complainant arranged for issuance of case papers and those case papers ultimately were seized as muddamal article by the Trapping Officer. These case papers were tendered before the learned trial Judge as Article No.4 (Ex.24). With those case papers, the complainant and the panch no.1 had been to the appellant and after the entry of appellant in his cabin, the appellant had asked the complainant as to whether the complainant has got issued the case papers or not. Thereafter, the complainant was asked that he should bring

the admission form and, therefore, the complainant and panch no.1 went out to bring that form. One female-nurse had given the said form and that form was attached with the case papers. Thereafter, both of them had again gone to the appellant. At that time, in the lobby of the said hospital Police Inspector Shri Manjariya and members of the raiding party had taken their position. The case papers and form were given to the appellant. The appellant had written something on those papers and inquired as to who is accompanying him and the panch no.1 was introduced as his brother. At that time, the appellant had said, “No problem, as per our talk give Rs.200/-”. So the complainant took out the muddamal currency notes smeared with anthracene powder and gave those notes to the appellant. The appellant accepted the bribe amount with his right hand and put them in his left side shirt pocket. Thereafter, the appellant had instructed that he should go through the test at about 04-00 p.m. and get himself admitted in the hospital. It is stated that thereafter he came out of the said cabin and gave signal.

Thereafter, Police Inspector Shri Manjariya immediately had rushed to the cabin of the appellant. He introduced himself as Police Inspector ACB and directed the appellant to keep himself in the very chair and not to move till further instructions. It is the say of the complainant that thereafter Police Inspector Shri Manjariya had asked the appellant as to where were those currency notes, which have been accepted by him from the complainant. At that time, the frightened appellant pointed out his left side shirt pocket by gesture. Thereafter, Police Constable namely Ramesh, who was equipped with ultraviolet lamp was called and ultraviolet lamp examination was carried out, wherein it was found that the hands of the complainant as well as the right hand finger tips of the appellant were stained with anthracene powder. The panch no.1 had taken out the muddamal currency notes from the pocket of the appellant. Along with the said two currency notes, one currency note of denomination of Rs.50/- which was there in the pocket of the appellant was also taken out and examined

under the ultraviolet lamp and one side of the said currency note was found stained with anthracene powder. All these three currency notes were seized in presence of panchas. The shirt of the appellant was also examined under the ultraviolet lamp rays and it was also found stained with anthracene powder near the left side shirt pocket and the anthracene powder marks were also there in the inner side of the said pocket. Thereafter, the appellant was searched and subsequently the second part of panchnama was drawn. The trustworthiness of the complainant is under a serious challenge and the defence has specifically pleaded that the complainant has acted as a tool to implicate the appellant with ulterior motive and at the instance of some close relative of Dr.Raithaththa, who was transferred in recent past from Dhoraji Hospital. There was a litigation in the Civil Court and the appellant had entered the office after the orders passed by the Civil Court and Dr.Raithaththa was compelled to leave Dhoraji Hospital and to join the place where he was transferred. It is argued by Shri Shethna that

this Dr.Raithaththa was having his roots in Dhoraji Taluka and one Maganbhai Dahyabhai, a relative of Dr.Raithaththa had some political influence in the area of Taluka Dhoraji as well as one Shri Rupareliya, who is the caste-fellow of Dr.Raithaththa and Sarpanch of village Pinpli, Taluka Dhoraji, had decided to see that the appellant is trapped, and therefore, the complainant having some knowledge of Court procedure and especially working of the criminal Courts, etc. was searched by them and the complainant has been used as a tool to target the appellant. Of course, these suggestions have been denied by the complainant but they were placed before the complainant (Page no.61 of the paperbook). It is alleged by Shri Shethna that somebody was financing the complainant and the complainant has tried to put curtain on that part but ultimately he is found exposed. In the cross-examination, the complainant has specifically accepted that he had left his village with an amount of Rs.250/- and this amount was taken by the complainant from his mother. The mother of the complainant was

managing the financial affairs of the family of the complainant and she had given the said amount to the complainant. Considering the expenses that the complainant may have made qua his journey from village Dhoraji and from Dhoraji to Rajkot in the State Transport Bus (S.T. Bus) or otherwise; and for food etc., at Rajkot, which obviously he would have, and the payment of the Guest House charges, of course in those days the things were not so costly but when it is in evidence, according to Shri Shethna, while drawing first part of panchnama, the appellant was having some amount with him on the next day morning and though he was told to stay in the office of the ACB by Police Inspector Shri Manjariya to stay over in the Government Guest House (perhaps free of costs), the complainant had stayed in a private Guest House. How he could have saved the amount which was found from his pocket on the next day morning after usual expenditure of tea, etc. because it is specifically mentioned in the first part of panchnama that the complainant was having currency notes of different denominations

amounting to Rs.250/- and a bundle of cigarettes, which are popularly known as “bidis” and a matchbox. According to the complainant, he had left from his house with an amount of Rs.250/-. From close reading of the evidence of the complainant, it emerges that he had reached Rajkot at about 08-30 p.m. after leaving his village Vadodar at about 04-30 p.m.. He belongs to Ahir community. He visited Rajkot on occasions and on all these occasions, he used to stay in any Guest House which is available. He had stayed overnight once in 'Patel Dharmashala' at Rajkot located behind the bus-station and it is stated that they were charging Rs.3/-. According to him, he was coming to Rajkot all alone on these occasions and had never stayed to the place of his relatives though there are many in the city of Rajkot and he was also taking meal outside and not at the residence of his relatives. According to Shri Shethna, this part of deposition exposes the complainant as a person visiting Rajkot on 08th January 1986 with an ulterior motive. According to Shri Shethna, the Court should look seriously to

the smallest contradiction or slightest improvement made by such a witness. He has admitted that he is having mother aged about 72 years and he reads newspapers. He was also knowing that a person who intends to lodge a complaint with ACB has to carry the amount which is required to be given as bribe amount and, therefore, he had left his village after taking an amount of Rs.250/- with him. Considering the earlier prosecutions, of course, they are about minor offences, it is possible for this Court to infer reasonably that the complainant is not an illiterate, innocent and rustic person and victim of circumstance. The abilities of the complainant which have emerged during the course of cross-examination were sufficient to resist the demand made by the appellant on the spot and he could have questioned the doctor as to why he is asking an amount of Rs.200/- as his expenses as the treatment in the Government hospitals is free of costs. It is in evidence that the hospital at Dhoraji does not have any facility of either blood transfusion or regular anaesthetist. Today the surgery of

appendicitis is not a major surgery, but prior to 20 years, all conscious steps were being taken in advance so that the complications, if any, can be met with. The patients were supposed to bring certain medicines from outside and were required to pay the charges of anaesthetist, etc. Of course, there is no evidence as to what was the mode of payment made to the outside doctors or experts called for such services at Government Hospitals. It is the experience of the Court that relative or a person accompanying the patient normally pays such amount outside the hospital and no formalities, like depositing the amount in the hospital and then its payment to the concerned doctor at subsequent date through Government Treasury, are perhaps observed. One of the arguments of Shri Shethna is that the evidence of the complainant is required to be evaluated that the appellant may have intimated about expenses that the complainant may incur for the surgery. Close reading of the case papers clearly reveal that the complainant was to be operated on the next day i.e. on 10th January 1986 and, therefore, he was asked to get

himself admitted on 09th January 1986 before 04-00 p.m. The hospital has laboratory. Surprisingly the operation was to be carried out only on clinical examination. It is true that it is not either unethical or illegal to operate a patient on clinical examination only. Certain scientific tests like Barium Test, X-rays, etc. are being carried out in all old abdominal surgeries of appendicitis. The Court cannot shut eyes to the very well-known facts in this area. If the doctor is satisfied on clinical examination, the patient can undergo a surgery and plan for an operation. The Court is informed that the appellant was Gynaecologist and not a general surgeon. The complainant, however, had agreed to get himself operated through a Gynaecologist, is also a question which needs consideration. It is in the evidence of the complainant that he was a suspected patient of appendicitis and, therefore, he was given tablets. He was tempted to change doctors within the period of six months. This complainant in his deposition at one place has stated that the said Dr.Babubhai had

specifically told the complainant that the pain is not because of appendicitis, otherwise the pain would not subsist and though he was not a patient of appendicitis, the appellant had diagnosed him as a patient of appendicitis and he had suspicion that he had been wrongly asked by the appellant to undergo operation and the idea of the appellant was to extort money. This Dr.Babubhai had asked the complainant that he had no appendicitis and it appears that this is nothing but an attempt to extort money (Paragraph no.14 of the deposition). The name of the said Dr.Babubhai has not been disclosed to the police by the complainant and he has clearly stated that till 07th January 1986, he was not aware or knowing at all that he is a patient of appendicitis. This version is clearly in conflict with his say in the complaint because he has stated specifically in the complaint that he has abdominal pain for the last 8 to 9 months. He has taken treatment from private hospital but there was no relief and he was told by the private doctor that he may have appendicitis. Thus, it is clear that on first

clinical tentative diagnose, he had gone to Government Hospital at Dhoraji. The Court is conscious that *falsus in uno, falsus in omnibus,* is not a good principle in our criminal jurisprudence. However, one falsity of a witness makes the Court more conscious and evidence of such witnesses need a very close scrutiny and the Court should try to seek maximum corroboration and the Court should not ignore the other modulation made by the witness in his deposition to suit with the substratum of the story placed by the prosecution and/or to win the sympathy of the Court. While evaluating the evidence of such witness, the Court should also consider minor contradictions and omissions. The ultimate effect of such modulations, contradictions, omissions vis-a-vis the falsity stated by the complainant in totality require consideration while accepting the say of such witnesses as reliable convincing piece of evidence. When the complainant has admitted that he was visiting Dr.Babubhai every after 15 to 20 days for his abdominal pain, he had neither taken any reference from the said Dr.Babubhai nor

Dr.Babubhai had referred him to any surgeon for further clinical examination. The say of the complainant before the appellant, when he had gone to the appellant on 07th January 1986 and also before Police Inspector Shri Manjariya at the time of filing of the complaint, was that he is a poor labourer, but it has come on record that the complainant is hailing from a family having agricultural land admeasuring 10 vighas and the complainant himself has 10 vighas of land and on 07th January 1986, there was cultivation of groundnut in his field. Normally the cultivation of groundnut is being done in monsoon season but if anybody claims that he has cultivation of groundnut in his field in the month of January, then it can reasonably be inferred that he must have sufficient water source in his field to cultivate groundnut crop during this period. When the complainant has admitted that normally the second crop of groundnut is being taken in the early summer and the field is being used for cultivating crop of wheat and gram during winter. So the probability of presence of such crop was much

higher in the month of January. The complainant was getting pain regularly and hence, his brother was taken as partner in cultivating his part of 10 vighas of land. The complainant was able to earn sufficient amount to meet with his yearly expenses from the said field. There was no reason for him then to pose himself as a poor labourer. It is true that there is no evidence to show that this witness had any animosity with the appellant and there is no cogent evidence as to his special relations with Dr.Raithaththa. The Court is conscious that suggestions made to a witness cannot take place of proof but they are sufficient to point out the probability and the defence can develop its case on the probabilities suggested to a witness. Ultimately, the Court may accept or may not accept the probabilities posed to a witness during his cross-examination. It is the experience of the Court that clever witnesses are able to deny certain facts if they are able to sense the effect of admission of facts suggested. So the Court should not act mechanically in rejecting the plea proposed by

the defenceside even though denied by the witness. The duty of the Courts in such a fact situation is to ascertain whether this proposed plea or probability suggested to witness is able to get some strength from the other evidence available on record. Such evidence may be of direct nature or indirect nature. It may be in the nature of some circumstance. When the complainant has admitted that Dr.Babubhai is regular doctor who was constantly saying to him that his abdominal pain is not a pain of appendicitis and his say before the Court is that none of the doctors had diagnosed him as a patient of appendicitis and when he has further admitted that after the date of complaint and success of the trap, he has never taken any treatment for abdominal pain or had undergone surgery for appendicitis or any type of further examination qua the disease diagnosed by the appellant and one another doctor who might have been consulted by the complainant prior to the date of trap for which he has made reference in the complaint Ex.13, whether it is safe for this Court to reach to a

conclusion that visit of the complainant to Dhoraji on 07th January 1986 with the complaint of abdominal pain was a genuine visit of a patient desirous to get relief from constant abdominal pain or was of a person sent with specific purpose. According to Shri Shethna, learned counsel appearing for the appellant, the said Police Inspector Shri Manjariya is the mater-mind in arranging the trap from the very beginning and he was even aware on 08th January 1986 that as arranged one person is going to come to his office and he shall have to arrange for trap for the appellant at Dhoraji Hospital. When such an argument has been advanced by Shri Shethna, the Court obviously shall have to concentrate more on the say of the complainant as well as the finding recorded by the learned trial Judge accepting the version of the complainant closely. The submission of Shri A.J. Desai, learned Additional Public Prosecutor, that the complainant belongs to Ahir community and had no relation whatsoever with Dr.Raithaththa, the defenceside ought to have brought some concrete evidence as to the relation between

the said Maganbhai Dahyabhai/Ladhabhai and/or Shri Rupareliya, Sarpanch of village Pinpali, Tal.Dhoraji. The Court can take judicial notice that there is one village Pinpali in Taluka Dhoraji and that village is in the vicinity of village Vadodar on the strength of the map of Taluka Dhoraji. It would be too much to accept from an accused that he should call somebody from the office of the Taluka Panchayat of Dhoraji and should prove that once upon a time a person having surname “Rupareliya” was the Sarpanch of the said village Pinpali. It is not denied seriously that Dr.Raithaththa and Shri Rupareliya are caste-fellows. The documents at Exhs.21 and 34 clearly indicate that Dr.Raithaththa was transferred from Dhoraji Government Hospital and vice him the appellant was posted; and as Shri Raithaththa was not interested in leaving Dhoraji Government Hospital, there was litigation. It is not a matter of dispute that after orders of the Court or because of the intervention of the Court proceedings, the said Dr.Raithaththa was compelled to join the another place where he was transferred. It is

true that the complainant cannot be said to be a Court-bird but at least he was having some experience and certain knowledge because of his habit of reading newspapers and was also having some experience of the Criminal Court proceedings as he has faced two different criminal cases on earlier occasions. In paragraph nos.26 and 27 of his deposition, the complainant has admitted that he was arrested by the police for the offence punishable under Section 506(2) of the Indian Penal Code along with other Sections. The said complaint registered against this witness is at Ex.15. The complainant was granted bail by the respective Court. He has also admitted that one of the criminal cases was registered for assaulting three police constables on duty and also for tearing the uniform of the police personnel. It is the say of this witness that the case registered against him was a false case. However, on acceptance, the FIR Ex.16 has been received in evidence. It is also relevant to mention at this stage that though the complainant has denied that he is doing transport business, he has admitted that he is

the driver of heavy motor vehicle and drives motor truck; and on the next day of his deposition and also on 22nd of the very month in which his deposition was recorded, he was to proceed to Maharashtra being the truck driver.

17. On one hand the complainant has deposed that he had stayed overnight in a private guest house and he was in the office of the ACB upto 09-30 p.m. and during his presence in the office of the ACB, no third person had entered on 08th January 1986. On the other hand, the defenceside has brought one important contradiction qua the earlier statement of the complainant recorded by the Police Inspector ACB Shri Manjariya on 10th January 1986, wherein he has stated that “after recording of my complaint, I have stayed overnight in the office”. The complainant has denied that he had stayed overnight in the office of the ACB and the Members of the raiding party had come to the office on the next day early morning. Of course, he has denied that when he reached the ACB Police Station at 06-30 a.m. on 09th

January 1986, the Members of the raiding party as well as panchas were present. The panch no.1 examined as PW-3 Ex.25 has stated that on 09th January 1986 at about 06-00 a.m., he had reached the office of the ACB. He was instructed by Police Inspector Shri Manjariya to reach the office of the ACB at about 08-00 p.m. on 08th January 1986. The complainant consented to Police Inspector Shri Manjariya to help in the Government cause and thereafter, he had left the place where he was stopped and he was asked by Shri Manjariya to come to the office of the ACB on the next day morning. In the cross-examination, he has referred to the very document of 08-00 p.m. According to Panch, he is having agricultural land behind Rajkot Junction and he was coming from that land. As he was coming via Jubilee area of Rajkot, he was passing through the office of the ACB and when he reached near the office of the ACB, Police Inspector Shri Manjariya had stopped him. At that time, the other panch Kishor and other two to three persons were standing there. Of course, he has shown ignorance of presence of Head Constable

Naranbhai, saying that he was not sure whether Naranbhai was the person standing on road with Police Inspector Shri Manjariya on that day. Now the say of Shri Shethna is that when it is the case of the complainant and prosecution that the complainant had reached the office of the ACB at about 08-30 p.m., how Police Inspector Shri Manjariya could have stopped two panchas prior to arrival of the complainant, i.e. firstly the second panch Kishor and thereafter the first panch Babubal PW-3. When it is the case of the complainant and the prosecution that firstly after arrival of the complainant, Shri Manjariya, Police Inspector, had peacefully heard and initially taken the details narrated by the complainant and thereafter, he had recorded his complaint. The complainant was also requested by Police Inspector Shri Manjariya that if he desires he can stay overnight in the office of the ACB itself. This must have consumed not less than 30 to 45 minutes. So if Police Inspector Shri Manjariya was very will there in the office after 08-30 p.m. for about 45 minutes, how he could have stopped and

arranged for two panch witnesses at about 08-00 p.m. It is alleged by Shri Shethna, learned counsel appearing for the appellant, that the complainant has deposed before the Court at the instance of Police Inspector Shri Manjariya, Trapping Officer, to support the case of the prosecution, so that Police Inspector Shri Manjariya and his selection of panchas may not receive any criticism of the Court. Whether such a complainant should be relied fully for his version qua the demand of bribe made and actual conversation that had taken place between the complainant and the appellant at Dhoraji Government Hospital on the day of trap, was the crucial question before the Court and the same has not been appropriately dealt with and appreciated by the learned trial Judge.

18. Now as per the settled legal position, the Courts are supposed to ignore minor contradictions and certain exaggerations made by a witness and if it is possible to separate grains from chaff then that exercise should be done by the Court because ultimately the trial

is a fact finding mission. But it is observed and accepted legal position that totality of conflict in evidence of a witness, the nature of modulations made and the effect of the omissions and improvements made by such a witness, are found sufficient to shake the trustworthiness of a particular witness then it would be safe for the Court to place reliance on the evidence of such witness and also to use the evidence of such witness as a corroborative piece of evidence qua the other witnesses examined by the prosecution. It is suggested that the complainant was adjusting his date and time of deposition to suit with the presence of Police Inspector Shri Manjariya in the Court when the trial was going on, and the questions placed to the complainant, to bring this aspect on record, certain questions were asked and an attempt has been made that on some occasions adjourments or time adjustments were sought by the complainant during trial and that too while recording his evidence by giving wrong reasons to the Court. Of course, this witness has attempted to explain the contingency but

it emerges that the explanation given by this witness is either not satisfactory or runs contrary to the contents of the adjournment application. The learned trial Judge has not considered this aspect at all while evaluating the evidence of the complainant but the same has emerged as significant contingency because this has happened qua the other important witness i.e. Panch witness Babulal also. It is easily inferable that the Public Prosecutor has not placed the panch witness Babulal in the witness-box till Police Inspector Shri Manjariya was available and capable to keep himself present in the Court premises. This aspect can be dealt with while evaluating the evidence of panch witness Babulal. It is suggested as one of the probabilities that the muddamal currency notes of Rs.200/- were taken out by the complainant and this amount was tendered saying that the doctor should keep the said amount so that in case if need be, the same can be spent in paying the fees of the Anaesthetist and also in bringing intra-veins salines, etc. It is clear from the evidence of complainant that no out of turn

priority was given to the complainant even on 09th January 1986 i.e. the day of trap. On 07th January 1986 also, he was examined by the appellant as per the practice adopted by the appellant and the said hospital. Normally a person from whom a corrupt Government servant has some hope to receive the illegal gratification, he would be tempted to show some favour to such bribe giver, but the answers given by the complainant in the cross-examination intend that on 09th January 1986, after taking out the case papers which were handed over to the lady peon sitting outside the cabin of the appellant and turn by turn the patients were called and at the time when the complainant's turn came, he entered into the cabin of the appellant. So no preference was given to the complainant. In the same way, he was asked to bring the admission form. It is neither the case of the prosecution nor the version of the complainant that the appellant had used the admission form which was with him or had arranged for such an admission form through his subordinate staff. This Court has reason to believe that some patients must have

been examined prior to the complainant and some must be there in queue. The statement of none of such persons has been taken, otherwise from the record of the hospital and the case papers, the Investigating Officer could have located such persons. Non-examination of the lady peon who is sitting just outside the cabin of the appellant, whether should be considered significant, is also a question which has not been appropriately answered by the learned trial Judge. It is true that no duplication is required and as such this lady peon was not an eye-witness but she had privilege to go inside the cabin even when the patients are sitting outside or being examined on the call of the doctor. She had very well permitted panch no.1 to enter into the cabin of the appellant with the complainant who was patient; otherwise either this lady peon or the doctor himself might have prevented the entry of PW-3 Panch no.1 in the cabin. Whether the panch no.1 PW-3 had ever entered into the cabin of the appellant and whether he had actually seen the events occurred or heard the conversation, are also questions. It is not

the say of Police Inspector Shri Manjariya that he was standing just outside the cabin and the entry door of cabin of the appellant was within his vicinity and visibility. So Police Inspector Shri Manjariya is not found competent to state that panch no.1 had actually entered the cabin of the appellant. If it is assumed for the sake of argument that the panch no.1 had accompanied the complainant in the cabin of the appellant, then that fact can help the prosecution. However, it would not go against the appellant. On the contrary, it is possible to infer, simultaneously, that permission given to Pw-3 Panch no.1 to enter into the cabin of the appellant by the lady peon and the appellant, is the conduct which can be said to be a conduct consistent to his plea of innocence, because the Examination Room of a doctor is a privileged area.

19. As discussed earlier, according to panch no.1-PW-3, he was a passer-by and when he was passing through the road near ACB Office, he was stopped by ACB Police Inspector Shri Manjariya at about 08-00 p.m. The time stated

by this witness is crucial and important. The claim of this witness is that he is a member of one charitable institution and actively participating in curbing the corruption and other such evils in the society and number of other members of the said public charitable trust had participated as panchas and helped the ACB in past, is the say of this witness before the Court. So the time stated by this witness of 08-00 p.m., whether should be ignored as a minor error in stating time, is the question which was required to be dealt with by the learned trial Judge. The learned Additional Public Prosecutor has not attempted to confront this witness even by refreshing his memory. The panch no.2 has not been examined. So before how many minutes prior to the time when the panch no.1 i.e. PW-3, was stopped and requested to act as panch and was asked to join as panch, has remained in dark. So the panch no.2 might have been stopped before some minute and certainly prior to 08-00 p.m. As per the say of the complainant, he had not reached Rajkot in the office of the ACB before 08-30 p.m. Surprisingly, the

person who was stopped first and requested to act as panch was not asked to act as panch no.1. It is true that Police Inspector Shri Manjariya was at liberty to use any of the two panchas as shadow panch of the complainant. Shri K.J. Shethna, learned counsel appearing for the appellant, has submitted that as per the Government circulars and the normal practice adopted by the ACB officials, the Government servants are requested to act as panch witnesses in trap cases arranged by the ACB. Though there was sufficient time for Police Inspector Shri Manjariya why he had not arranged Government servants to act as panch witnesses, is not coming forth, and therefore, it is argued that both these panchas were selected with an ulterior motive and the element of transparency and objectivity in selecting the panch should be held to be missing. It is true that a private individual can act and also can be asked to act as panch even in ACB trap cases and a reliable and reputed independent citizen perhaps can be considered as more reliable witness because it is the practice of the defenceside to argue

that the Government servants selected as panchas so that the ACB can put pressure on them and under apprehension of departmental proceedings, such panchas are being asked to depose in a particular manner and as per the wish and desire of the Trapping Officer. So the panch no.1 PW-3 examined in the present case should be accepted as a man of that independent repute, is the question before the Court. This Court while dealing with an appeal under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, has jurisdiction to re-evaluate the entire evidence and if need be, the Court can re-write the judgment either confirming the judgment and order of conviction and sentence or its reversal, is the settled legal position. The circumstance that has come on record indirectly in the evidence that Police Inspector Shri Manjariya was perhaps knowing about arrival of the complainant to his office at about 08-30 p.m. What was the reason for Police Inspector Shri Manjariya to be there in the ACB Police Station at 08-30 p.m. on 08th January 1986, has not come on record in a

satisfactory manner, if the Court looks to the version of Police Inspector Shri Manjariya; nor the Public Prosecutor has attempted to put any question in this regard so that Police Inspector Shri Manjariya can explain the contingency. The ACB Police Station is not a regular Police Station and unless the officials are busy for some other work, only Police Station Officer or one officer of the rank of Police Sub-Inspector would be there. The complainant has stated in his deposition that when he reached the office of the ACB at 08-00 p.m. or 08-30 p.m. Police Inspector Shri Manjariya was present in his office and the members of the staff were also there and after taking certain details, the Police Inspector Shri Manjariya had recored the complaint Ex.13. The question of selection of panch would come only thereafter. It is not the say of panch no.1 PW-3 that somebody else than Police Inspector Shri Manjariya had called him and he was asked to see Police Inspector Shri Manjariya sitting in his office. Rajkot is the District Headquarter and was/is the biggest city in Saurashtra region. Each citizen of

Rajkot City may not know by name the officer working as Police Inspector of ACB. It is the experience of the society that the police personnel deputed to the ACB Police Station are not supposed to put on uniform regularly and normally they are in private dress. They are moving and performing their duties in private dress. It is not the say of the complainant that he was present with Police Inspector Shri Manjariya when panch no.1 Babulal was called, selected and requested to act as panch. Both the panchas were introduced to the complainant first time on 09th January 1986 in the morning as panchas had reached the office in the morning at 06-00 a.m. i.e. earlier than arrival of the complainant, from the private guest house where he had stayed overnight, in the office of the ACB. The panch no.1 had reached in the office of the ACB at 06-00 a.m. and the complainant had reached at 06-30 a.m., is the evidence. The version of the panch no.1-Babulal PW-3 is that when he was passing through a road near the State Bank of Saurashtra, at that time three to four persons were standing there and Police

Inspector Shri Manjariya was one of them. The said Police Inspector Shri Manjariya had stopped and called panch no.1 and had ascertained the name, business, etc. of panch no.1. At that time panch no.2 i.e. Kishorbhai, was also standing there and details of his name, address, etc. were also taken. It is not in evidence that any of these two panchas were given written intimation to come down to the office of the ACB at 06-00 a.m. on the next day. How and why the panch no.1 was knowing Police Inspector Shri Manjariya, are the questions which have not been appropriately answered by the prosecution and this is sufficient to create an impression in the mind of the Court that panch no.1 was knowing ACB Police Inspector Shri Manjariya. He was conscious about his status and also knowing his surname. On one hand, when the say of the complainant is that the Police Inspector Shri Manjariya was all the while with him in the office of the ACB, then how the say of panch no.1 PW-3 can be believed as to his selection as panch at 08-00 p.m. on 08th January 1986 along with other panch Kishorbhai. It is

possible to smell that there was some link between panch no.1 Babulal and Police Inspector Shri Manjariya, and while hammering the point that in the present case the selection of panch witnesses is neither transparent nor objective, Shri Shethna has taken this Court through the following facts which are there in the deposition of panch no.1 PW-3:

(i) The panchs were with the members of the raiding party since 06-00 a.m. till 08-30 p.m. on 09th January 1986 and panchas were in constant company of the Trapping Officer and the members of the raiding party (paragraph no.9).

(ii) Though this panch no.1 has stated in paragraph no.1 of his deposition that ACB Police Inspector had stopped and called him, he submits contrary in paragraph no.9 of his deposition that as he was with Police Inspector Shri Manjariya since 06-00 a.m. till 08-30 p.m. on 09th January 1986, he had come to

know about the name of Police Inspector Shri Manjariya, Shri Jhala, one Rameshbhai and Naranbhai. Here the reference of name of Naranbhai in the deposition of this witness is significant. However, he has stated that he is not aware that this Head Constable Naranbhai was there in the office in the early morning when she had reached the office of the ACB. According to him, he was not knowing the Head Constable Naranbhai prior to that time.

(iii) The panch no.1 was the labour contractor but he is not a Government approved labour contractor and he was not paying Income Tax at that point of time. He used to go for his work at about 08-00 a.m. and was returning after 06-00 p.m. During those days, his work in one Sahakar Society was going on and that society is located near Nilkanth Talkies but at that time when he was stopped by Police Inspector Shri Manjariya, he was not returning from his work place but

was proceeding towards his residence from his farm house. It is not specifically stated by this witness that from going from his farm house to his residence one shall have to pass through a road leading to State Bank of Saurashtra near ACB Office. There is no reference of distance between the farm house and his place of residence. The prosecution ought to have at least stated that the distance between two places is reasonably a walking distance of 1, 2 or 3 kms. So during evening hours one can go on foot from his farm house to his residence located across Rajkot City. Though number of persons were passing through that road only, panch no.1 PW-3 was stopped and asked to act as panch. This witness claims that he was not knowing that for which work his services were being asked for by Police Inspector Shri Manjariya. He was only asked that his services are required in a Government work and at that time he was not even knowing that

Police Inspector Shri Manjariya is an officer in ACB. However, he was told that on the first floor there is the office of ACB and he had to go there.

(iv) In paragraph no.12 of his deposition, after stating certain facts, this witness had turned around and had deposed different facts saying, “.. .. Now I say that ... ...”.

(v) This panch witness has not requested the Police Inspector Shri Manjariya that he is a labour contractor and his whole day will be spoiled and, therefore, he may be pardoned. This witness has denied the suggestion that he was made conscious of one fact that the trap is to be arranged at Dhoraji and, therefore, he was to come to Dhoraji and it may take long hours and, therefore, he should inform at his residence that he shall return home very late.

(vi) According to this panch witness, when he

left around 08-15 p.m. on 08th January 1986, second panch Kishorbhai was still standing there. He has also stated that when Police Inspector Shri Manjariya had asked him to act as panch on the first day i.e. on 08th January 1986, the complainant-Bavanji was present. This version is totally contrary to the version of Police Inspector Shri Manjariya and the complainant-Bavanji.

(vii) This panch witness has accepted in paragraph no.14 of his deposition that if anybody wants to go to Punitnagar from Junction area, he can straightway go through Dhebar Road and that road would be shorter. However, he has stated that he cannot say that the route selected by him was comparatively a long route. This panch has admitted that he is a member of Sardar Patel Yuvak Mandal and also a member of the Executive Committee of the said “Mandal”. The document tendered in evidence during the deposition of this witness Ex.27 clearly

reveals that he is one of the trustees and this Mandal is registered as a Public Charitable Trust. Ex.27 is the extract of Register maintained by the office of the Charity Commissioner under the Bombay Public Trust Act, 1950. One Mohanbhai J. Pansuriya is the President of the Trust and Nanalal Bhagwandas Kyada is the Vice President. He has further stated that one Nathalal Chandarana is the Secretary of the said Trust since inception of the Trust.

(viii) In paragraph no.18 of his deposition, this witness has stated that he is not aware whether Nathalal Kyada was called once to act as panch in the trap arranged by ACB. He also does not know whether the Secretary namely Nathalal Chandarana was taken as panch in the case of trap arranged by the ACB against Abdul Karim Babubhai Moghal. One Hansrajbhai Dudhagra is the Treasurer of the said Trust but he is not aware that he was asked to act as panch in the trap

arranged by the ACB on 23rd March 1984. Of course, he has denied that the said Hansraj Dudhagra was a Municipal Corporator elected as Congress Party Candidate. However, he has admitted that Nathalal Chandarana was a Corporator in the Corporation as Congress Party candidate. This witness is also not aware whether Hirabhai Popatbhai Khunt, Member of the Executive Committee, was also asked to act panch in a trap arranged by the ACB. This witness has admitted that one Police Head Constable Naranbhai is the Member of the Executive Committee of the said Trust. However, this witness has denied that this Naranbhai is posted with the office of the ACB. According to him,he was with “D Staff”. This witness has consciously admitted to keep curtain on his relations and acquaintance with this Naranbhai for the reasons best known to this witness because Police Inspector Shri Manjariya in his deposition has categorically admitted that in his ACB

office at Rajkot, the Head Constable Naranbhai was there and he is still there, and his statement was also recorded by him as a member of the raiding party. Meaning thereby, the said Head Constable Naranbhai and panch no.1-PW-3 were enjoying the same status in Sardar Patel Yuvak Mandal, a charitable trust, since both were trustees. Even then this witness has dared to state that he was not aware about the presence of the said Naranbhai when he was stopped, called and requested to be a panch; and whether the said Naranbhai-Head Constable was present at 06-00 a.m. when he reached the office of the ACB. As the statement of Naranbhai has been recorded as a member of the raiding party, it can reasonably be inferred that he was a member of the raiding party which had started preparations since 06-30 a.m. on 09th January 1986. It is true that Police Inspector Shri Manjariya has also not admitted that number of members of this Trust where

one of the Head Constable working with the ACB office is actively connected as member of the Executive Committee, were taken as panchas in the traps arranged by the ACB at Rajkot. The suggestions have been made by the defence counsel naming the ACB Police Inspector Shri Sarvaiya, the predecessor of Police Inspector Shri Manjariya. But it is also important to note that he has also not denied this suggestion. He has simply stated that he does not know. It is settled legal position that a fact denied by a witness is materially different qua the fact either not admitted or the fact not known to a witness. While responding to all these suggestions, it was possible for Police Inspector Shri Manjariya to state that he can respond well to these questions only after verifying the record and not otherwise. When all these suggestions were made, the prosecution could have examined ACB Head Constable Naranbhai Patel, who was a member of the raiding

party and also a member of the Trust along with panch no.1-PW-3 Babulal because it is clear from the evidence of Police Inspector Shri Manjariya that the said Naranbhai Patel was the Head Constable with ACB office since long.

(ix) Whether selection of panchas from such a trust by Police Inspector Shri Manjariya is a decision which can be encouraged by the Court or such a practice should be deprecated or another independent comment is required to be made, is an issue which needs consideration. A social organization if is anxious to undertake an activity to curb the evil of corruption by joining hands with ACB, then selection of a person connected with such an organization as panch should be viewed from a different angle since there will have some scope for the misplaced enthusiasm to play a role. In such a fact situation, the Court should insist for maximum transparency and objectivity in the conduction of the

trap as well as in drawing trap panchnama. In bribery case, the duty of the officer is to secure independent witnesses for raid and for that serious endeavours are required to be made. Here in the present case, it has emerged that Police Inspector Shri Manjariya perhaps was aware about the arrival of the panch and, therefore, he had informed the panch witnesses to be there in his office at 06-00 a.m on the next day morning on 09th January 1986. The conflict in the evidence in this regard affects the objectivity of even Police Inspector Shri Manjariya and the close ties with one of the members of the raiding party Naranbhai Patel and other members of the Sardar Patel Yuvak Mandal, a public charitable trust, and also with panch no.1-Babulal who claims to be a member of the Executive Committee with Naranbhai in the said Trust, carves out a probability that Police Inspector Shri Manjariya might have asked the Head Constable Naranbhai

to bring any person as panch on the next day morning when he comes to office to join the raiding party from the Trust where he is a member/Trustee. Both these situations affect adversely to the expected independence of panchas selected, especially panch no.1-PW-3 Babulal examined by the prosecution.

(x) The Apex Court in its decision in the case of ***Raghbir Singh v. State of Punjab, reported in AIR 1976 SC 91***, while reversing the finding of the High Court, has observed in paragraph no.8 inter alia as under :

> “8. ... ... It is indeed a sad commentary on the functioning of the anti-corruption department in this case that the only safeguard against false implication in the offence of bribery which is provided by the presence of independent and respectable witnesses was completely

ignored and two witnesses were taken, one of whom was a relative of Jagdish Raj and the other, a sweeper in the whole time employment of the police. We must take this opportunity of impressing on the officers functioning in the anti-corruption department to insist on observing this safeguard as zealously and scrupulously as possible for the protection of public servants against whom a trap may have to be laid. They must seriously endeavour to secure really independent and respectable witnesses so that the evidence in regard to raid inspires confidence in the mind of the court and the court is not left in any doubt as to whether or not any money was paid to the public servant by way of bribe. We cannot, in the present case, rely on the evidence of Jagdish Raj and Arjun Das for the purpose of holding that a sum of Rs. 50/- was paid by

Jagdish Raj to the appellant, by way of bribe."

In view of above observations, it will be difficult for this Court to show any agreement qua the finding recorded by the learned trial Judge whereby the learned trial Judge has observed and expected that the say of PW-3 requires to be accepted qua demand and acceptance of the bribe amount from the complainant as alleged as discussed earlier. It is doubtful that the complainant was genuinely required to be operated for the alleged abdominal pain of appendicitis. Clinical diagnose has been arrived at on examination of patient and in the case abdominal pain, the say of the patient to the doctor on the description as to the area of pain pointed out by the patient plays a very vital role. When the complainant has admitted that after the trap he has neither been treated for the said abdominal pain nor he has gone for any

abdominal surgery, has tempted me to observe that he may have used himself as a tool in laying a trap and was sure that ultimately he is not to undergo a surgery. The visit of the complainant to Dhoraji for the first time was on 07th January 1986. The case papers produced and proved by the PW-2 dresser of the hospital at Ex.18, reveal this fact. As mentioned earlier, number of patients had visited the hospital and were examined by the appellant, which is also inferable from the copy of the case Register Ex.19. The appellant was transferred to Dhoraji vice one Dr.Raithaththa vide order dated 21st October 1985 and the said Dr.Raithaththa was informed accordingly by Civil Surgeon, Rajkot on 22nd September 1985. A copy of this order is at Ex.21. The document at Ex.36 indicates that a suit was filed by the appellant in the Court of Civil Judge (Junior Division) at Dhoraji being Regular Civil Suit No.252/85 alleging that the defendant

Dr.Raithaththa intends to snatch away the charge of his office and, therefore, a prohibitory order may be granted in his favour and against the defendant Dr.Raithaththa.

(xi) Whether the appellant was transferred permanently vice the said Dr.Raithaththa or he was posted temporarily was also a dispute between them. One document Ex.35 clearly shows that the appellant was transferred as Medical Officer (Class-II) to the Hospital at Dhoraji on 29th July 1985. So it is clear that the dispute as to the seniority, as to the charge and right to head the Hospital at Dhoraji, were live from July 1985 to October 1985. The time gap between October 1985 and January 1986 is not a big time gap. It is not even clear from the document produced as to since when the appellant had started working peacefully and without litigation in the Government Hospital at Dhoraji. The defence of the appellant is clear that a

false trap was arranged by the persons supporting Dr.Raithaththa who was there in the Government Hospital at Dhoraji for long and also at the behest of Dr.Raithaththa. When such a plea is advanced, lack of transparency in the investigation and in selecting the independent reliable panch witnesses shall have to be considered appropriately.

(xii) It is true that to lead evidence of scientific nature, it is not illegal to use anthracene powder. Of course, it is observed by the Apex Court as well as this Court in number of cases that the Trapping Officer should use phenolphthalein powder as the use of anthracene powder in laying down a trap and collecting corroborative piece of evidence of scientific nature with the help of anthracene powder would not make the trap illegal, void or doubtful. It would depend on the nature of evidence led by the complainant and the panch

witnesses and their reliability otherwise. Mainly the independence and reliability of shadow panch selected to accompany the complainant while giving the bribe amount to the accused because the demand and acceptance of illegal gratification/ bribe, two important ingredients and to prove both these ingredients, the prosecution is supposed to lead full-proof evidence. There should not be any scope to raise a doubt and to bring home the charge of demand and acceptance of the bribe, the prosecution can rely on various aspects over and above the deposition of important witnesses i.e. panchnama, and so also the conduct of the appellant prior the trap and subsequent to it. In the present case, the prosecution has not led any evidence as to the conduct of the appellant qua prior to the trap and no legal admissible evidence is available on record which would go against the appellant qua his conduct even subsequent to the trap. On the

contrary, as observed earlier, on the date of trap, the appellant was performing his duty as a doctor in the hospital as per the norms and the appellant was calling patients turn by turn, and the patients were also directed to get themselves admitted before 04-00 p.m. So there is no evidence as such in the conduct of the appellant which can carry the case of the prosecution further.

(xiii) While evaluating the judgment and order under challenge in the background of the submissions made by Shri Shethna, learned counsel appearing for the appellant, the Court decided to go through the proceedings drawn by the learned trial Judge in conducting the case against the appellant and on close reading of the proceedings drawn, has thrown light on the following facts :

1. The complainant has sought for adjournments by stating false

grounds in the adjournment application Ex.9 for which this witness has been cross-examined by the defence counsel and that part of evidence has been discussed in detail in the foregoing paragraphs.

2. On 28th August 1989, after recording evidence of PW-2 dresser in the said hospital, who was a formal witness and who had produced certain documents, the matter was adjourned on the adjournment application of the learned Additional Public Prosecutor.

3. The complaint exhibited vide Ex.13 says that recording of complaint was over at 21-30 hrs. on 08th January 1986. However, the copy sent to Special Judge on 09th January 1986 at about 08-15 p.m. shows the date which is found overwritten on the first page. Whether it is made from 9 to 8 or from 7 to 8, is not easy to assess.

4. The day on which the deposition of PW-2 came to be recorded, the Police Inspector Shri Manjariya was not present and it is mentioned in the adjournment application given by the learned Additional Public Prosecutor that the Investigating Officer Shri Manjariya is busy at Bilimora on other duties and therefore, the learned Additional Public Prosecutor may be given time. If the learned Additional Public Prosecutor was really interested in adjournment on account of non-availability of Police Inspector Shri Manjariya, he had examined one witness and got certain documents exhibited but did not proceed to examine panch no.1-Babulal on that day. A copy of the message received is attached with the adjournment application. So the learned Additional Public Prosecutor or

panch no.1 or both were waiting for arrival of Police Inspector Shri Manjariya. How and why the presence of Police Inspector Shri Manjariya was required before putting the panch no.1 in the witness-box, is a question, which according to me, remains unanswered. It is also relevant to note that material contradictions and improvements made by the witnesses have been proved during deposition of Police Inspector Shri Manjariya. It is not easy to ignore one aspect pointed out by Shri Shethna that only an amount of Rs.160/- was recovered from the appellant at the time of raid.

5. Though none of the panchas was intimated in writing by Police Inspector Shri Manjariya, he was sure that both the panchas will turn up in time.

6. He has not stated that he had noted

down the names and addresses of the persons who were instructed to come down on the next day morning as panchas though none of these two was a Government servant. The element of assurance in the mind of Police Inspector Shri Manjariya is an adding circumstance to an inference that the selection of panch was not as per the required standard of objectivity and transparency. One case was pointed out to Police Inspector Shri Manjariya that a trap was arranged at Dhoraji on 08th January 1986 or on early hours on 09th January 1986 and that town being a taluka town, the local panch could have been arranged. His attention was also drawn by a pointed suggestion that his predecessor had once adopted that practice. The question before the Court is that the circumstances speak that there was no need to get two outsiders as panch and that too

a person or persons close to one of the members of the raiding party. The contradictions proved in paragraph no.14 of the deposition of Police Inspector Shri Manjariya makes the presence of Police Inspector Shri Manjariya in the corridor of the hospital where the trap was laid down doubtful. As Police Inspector Shri Manjariya himself as stated in paragraph no.15 of his deposition that the complainant had come to his office on 08th January 1986 between 08-30 p.m. and 08-45 p.m., and he had arranged for panchas at about 10-00 p.m. When the say of panch no.1 is that he was asked to act as panch at about 08-00 p.m., the difference of two hours in a day of winter season in the month of January is not totally ignorable discrepancy. The time gap 15 to 20 minutes or half an hour could have been ignored by the Court without

magnifying this aspect. It is in evidence that Police Inspector Shri Manjariya was very well there for some time in the ACB office at Rajkot. Police Inspector Shri Manjariya has also shown ignorance about litigation that had taken place between Dr.Raithaththa and the appellant. There was no reason for Police Inspector Shri Manjariya to deny the suggestion made by defence counsel that he could have selected panchas in the early morning on 09th January 1986 and there was no need to select panchas on 08th January 1986. The distance between Rajkot and Dhoraji is of about 01 hour and 45 minutes. So conveniently the trap could have been arranged on 09th January 1986 by calling the panch from Dhoraji itself and during the said period Shri Sarvaiya, Police Inspector, was also there in the Rajkot ACB office and both were helping each

other is the admission. In this background of fact, Shri Manjariya could have denied specifically the suggestion made by the defence counsel that they used to call members of Sardar Patel Yuvak Mandal as panchas. One case i.e. Special Case No.36 of 86 as pointed out to this witness and his answer in the Court is that he does not know whether one Nathalal Chandarana was called by the ACB in arranging the trap. In one another case name of the appellant was also pointed out and the selected panch was also named but the answer of Shri Manjariya was that he does not know. When two officers were there in the ACB office at Rajkot and suggested contingencies have not occurred, Shri Manjariya would have denied the same. The answers given by Shri Manjariya make his objectivity and independenceness as Investigating Officer doubtful.

20. Here with aforesaid all the facts and circumstances and discussion, the observations made and findings recorded in the case of ***Kanu Ambu Vish v. State of Maharashtra, reported in AIR 1971 SC 2256***, would help the appellant. Paragraph no.8 of the cited judgment which is relevant can be reproduced hereinbelow but I do not think it is necessary. However, for the sake of brevity and convenience, I would like to quote the relevant part of the cited decision which is as under :

> *"8. ... ... In fact in the Panchnama Ex. 24 it is recorded that the Appellant had denied even at that very stage when asked to produce the amount of bribe that he had accepted the money. It is pointed out that while the Panchnama says that the shining of the note and of envelope was faint blue, none of the witnesses in their deposition say that there was a glow or a shining blue. It is stated in the Panchnama that the Complainant put one*

folded ten Rupee note in the envelope with his right hand and when a little portion of the fold of the note could be seen outside, the Havaldar pushed it inside with his left hand, kept the envelope on the table and placed the cap on his head with his right hand over the envelope. The Complainant P. W. 1 however says in his deposition in the Cross-examination that the Appellant took out his cap with his left hand and placed it on the envelope which he had placed on the table. There is therefore an indication that when no powder was discovered on the cap in the Panchnama a statement that the Appellant had placed his cap on the envelope with his right hand has been made. It may also be noticed that Panchnama speaks only of one note of Rs. 10/- being put in the envelope and no other notes, while the case of the prosecution is that there were two notes of Rs. 10/- and one of Rs. 5/- that were placed by the complainant in the envelope. Some of these statements

in the Panchnama which contradict the evidence of the Panch witnesses and the complainant were not put to them as such no notice can be taken of these contradictions."

21. In the present case, the panchnama is considered by the learned trial Judge as star document. But in view of the above observations and findings when the panch no.1 Babulal appeared to be a selected panch and a trap appears to be arranged trap to some extent, it would be risky to give any weightage to panchnama. In the same way and for the very reasons, the use of anthracene powder and act of not using the phenolphthalein powder by Police Inspector Shri Manjariya, would assume importance. This Court and the Apex Court has expressed the opinion in favour of use of phenolphthalein powder at the time of arranging the trap. The case papers produced by prosecution clearly reveal that the complainant was diagnosed by the appellant as a patient of appendicitis and the operation as arranged on the next day. But

there is no reference in the complaint that the appellant had demanded an amount of Rs.200/-. This vital aspect has not been considered at all by the learned trial Judge. So the demand of Rs.200/- by the appellant is a material improvement (paragraph no.13 of the deposition at Ex.31). In the same way, there is one material omission which has been brought as contradiction says that the complainant has not stated in his statement that the appellant had asked about the person accompanying him and he had replied that he is his brother and at that time, the appellant had stated, “No problem and as per our talk give Rs.200/-”. With this it would be difficult for the Court to accept the contents of the panchnama through which the prosecution has tried to prove the conversation which had taken place between the appellant and the complainant. With this what weightage should be given to the part of panchnama wherein it is mentioned that anthracene powder marks were seen by the complainant and/or panch no.1 as deposed by them. On the contrary, the observations made by the Apex Court in the

case of ***Khilli Ram v. State of Rajasthan, reported in AIR 1985 SC 79***, would help the appellant. In this decision, the Apex Court has considered the observations made by the Apex Court in its earlier decision in the case of ***Raghbir Singh (supra).*** For the sake of brevity and convenience, I would like to reproduce the relevant paragraph nos.11 and 12 of the cited decision, which are as under :

> *"12. Ordinarily in cases of this type the powder treatment is made. There is no material at all on the record to explain why such a process was not followed in the instant case even though detection is alleged to have been handled by experienced people of the Anti-Corruption Department. PW.6 was a very senior officer and in fact by the time the trial took place he had retired from service. It is difficult for us to accept the position that he was not aware of the powder treatment. It has been in vogue for well over three decades now. If such powder*

treatment had been made, the passing of the bribe would indeed not have been difficult to be proved."

22. In the case of ***Mahobatkhan Yusufkhan Malek v. State of Gujarat, decided on 18th December, 2004, this Court (Coram : Akshay H. Mehta, J)*** has inter alia held, " .. .. Thus, the Desirability of treating the notes with phenolphthalein powder is emphasized by the Apex Court and this Court in their different decisions. In the present case, the Investigating Officer has not used it. Not only that but he has shown his ignorance about the qualities of phenolphthalein powder. .. ..". Of course in the present case, no pointed question was asked as to why the Trapping Officer had failed in using the phenolphthalein powder but the circumstances which have emerged have taken me to a conclusion that this is a case wherein use of phenolphthalein powder would have given more cogent and convincing evidence because the evidence of panch witness appears to be the evidence of a person interested or whose

independence is under a great shadow of doubt. I would like to reproduce the relevant paragraph nos.14 and 15 of the decision in the case of ***Gopal Lal Ghisulal Chhipa v. State of Gujarat, reported in 1999 (1) GLR 546***, wherein this Court has held in paragraph no.14 as under :

> *"14. Of course, when the tips of the right hand finger of the deceased-appellant were seen focusing the ultra-violet lamp rays, they were found with glittering with light blue florescent marks, and that would prima facie lead any one to hold that the deceased-appellant accepted the amount. It may be stated that in this case anthracene powder used. The Supreme Court in this regard in the case Ranbir Singh v. State of Punjab, AIR 1976 S.C. 91 has made it clear that it is desirable that the currency notes to be used for the purpose of trap should be treated with phenolphthalein powder so that the handling of such marked currency notes*

by the public servant can be detected by chemical process and the court does not have to depend on oral testimony which is some times of a dubious character for the purpose of deciding the fate of the public servant. This High Court when the occasion arose in the case of a Nathalal Govindji Vaghela v. State of Gujarat-IXX (2) G.L.H. 190 has likewise held observing further that in the case of anthracene powder there is no detection by any chemical process and therefore the use of anthracene powder must be ruled out even if the witnesses may speak about a particular marks being found when the concerned articles and limbs are viewed under an ultra violet lamp. It still rests entirely on the oral evidence of witnesses in whose presence the experiment is alleged to have been carried out with no opportunity to test their veracity by reference to any scientific method of testing and analysis, which is surely available in a case in which phenolphthalein powder

is used. The Supreme Court again in the case of Khilli Ram v. State of Rajasthan-1985 S.C.C. (Cri.) 24 has made it clear that phenolphthalein powder treatment to currency note to be used for the purpose of trap should be resorted to. The Allahabad High Court in the case of Devendra Narain v. State of U.P.- 1993(3) Crimes 167 has held to which I agree that it is mandatory for the leader of the trap to treat the bribe money with phenolphthalein powder before laying the trap and in the absence of any explanation for not so doing, the prosecution case becomes suspect. In this case anthracene powder is used and not the phenolphthalein powder, which would not lead the court with certainty to reach a particular definite conclusion. For not using the phenolphthalein powder no explanation is offered by the prosecution. When that is the case, nothing with certainty can be determined in favour of prosecution. It would not therefore be just and proper to conclude against

the appellant simply on the basis of the light blue florescent marks that could be noted on the hands and limbs. At this stage, it is necessary to refer to the decision of this Court rendered in the case of Ambalal Motibhai Patel v. State- AIR 1961 Gujarat 1, wherein it is laid down that if the anthracene powder is used, the prosecution has to clearly prove that no powder was detected with naked eye, and that when ultra violet light was focused, there was emission of light blue florescent light. If the evidence proved positive result for both the tests it would be right to infer that anthracene powder was present. In short the prosecution has to prove that there was light blue emission of light under the influence of ultra violet lamp. It is not sufficient for the prosecution to prove that under the ultra violet light, witnesses saw the stains of while powder, or even that under ultra violet light they saw some sparkling or some shimmering. In this case neither of the

witness inclusive of the Investigating Officer says that when ultra violet lamp rays were focused, light blue flourescent marks could be seen. They only say that marks of powder were seen on something sparkling could be seen. This, in view of above-referred decision of this Court in the case of Ambalal Motibhai Patel is not enough. Hence on the techniques of anthracene powder no definite conclusion can be drawn, but it seems that the learned Judge below overlooked this aspect and was mainly swayed away with the techniques of anthracene powder. The case of "acceptance" therefore on the basis of the marks noted, cannot safely be accepted."

23. For the sake of argument, if the version of Police Inspector Shri Manjariya is accepted that the muddamal currency notes have been recovered from the appellant, then also in all probabilities the same may have been handed over to the doctor for the expected

expenditure that the complainant was likely to incur and the case would become at the most the case of mere recovery of amount. The probability that has come on record says that this is not a case where the appellant could have been held guilty under the law of presumption. The acceptance of amount as bribe amount has not been found proved in absence of evidence of reliable nature, the evidence of recovery of amount loses its sanctity and the case would become a case of mere recovery.

24. For short, in view of aforesaid, the Court is in agreement with the submissions made by Shri K.J. Shethna, learned counsel appearing for the appellant, which carry sufficient weightage, legally and logically too compared to the above referred submissions made by Shri A.J. Desai, learned Additional Public Prosecutor, appearing for the respondent-State. It is difficult for this Court to say that the prosecution was able to bring home the charge beyond reasonable doubt. This is not the case wherein the appellant ought to have been acquitted by the learned trial Judge

by giving him benefit of doubt.

25. If the learned trial Judge was of the view that the appellant being a Gynaecologist was not entitled to operate a patient on clinical examination for appendicitis and his certain conduct in the Government hospital was not befitting to a responsible Government officer, the learned trial Judge could have observed that the appellant should be subjected to departmental proceedings but on moral conviction the appellant could not have been linked with such a serious offence on the evidence of hazy and doubtful nature.

26. In view of above observations, reasons and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 20th July, 1990 passed by the learned Special Judge, Rajkot in Special Criminal Case No.45/86, is hereby quashed and set aside. The appellant-orig.convict-accused is hereby ordered to be acquitted from all the charges levelled against him in respect of the

offence in question. The bail bond, if any, stands discharged. The amount of fine, if any paid, be refunded to the appellant on proper identification.

(C.K. Buch, J)

Aakar